No. S-17965

IN THE SUPREME COURT OF THE STATE OF ALASKA

Yvonne Ito,
Appellant,
v.
Copper River Native Association,
Appellee.

On Appeal from the Superior Court
Third Judicial District at Anchorage (Crosby, J.)
Trial Court Case No. 3AN-20-06229CI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

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25 U.S.C. § 5381

§ 5381. Definitions

(a) In general

In this subchapter:

(1) Construction project

The term "construction project"--

(A) means an organized noncontinuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities, as described in a construction project agreement; and

(B) does not include construction program administration and activities described in paragraphs (1) through (3) of section 5304(m) of this title, that may otherwise be included in a funding agreement under this subchapter.

(2) Construction project agreement

The term "construction project agreement" means a negotiated agreement between the Secretary and an Indian tribe, that at a minimum--

(A) establishes project phase start and completion dates;

(B) defines a specific scope of work and standards by which it will be accomplished;

(C) identifies the responsibilities of the Indian tribe and the Secretary;

(D) addresses environmental considerations;

(E) identifies the owner and operations and maintenance entity of the proposed work;

(F) provides a budget;

(G) provides a payment process; and

(H) establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.

(3) Gross mismanagement

The term "gross mismanagement" means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory, or statutory requirements applicable to Federal funds transferred to an Indian tribe by a compact or funding agreement that results in a significant reduction of funds available for the programs, services, functions, or activities (or portions thereof) assumed by an Indian tribe.

(4) Inherent Federal functions

The term "inherent Federal functions" means those Federal functions which cannot legally be delegated to Indian tribes.

(5) Inter-tribal consortium

The term "inter-tribal consortium" means a coalition of two1 more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations.

(6) Secretary

The term "Secretary" means the Secretary of Health and Human Services.

(7) Self-governance

The term "self-governance" means the program of self-governance established under section 5382 of this title.

(8) Tribal share

The term "tribal share" means an Indian tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions.

(b) Indian tribe

In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this subchapter, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this subchapter). In such event, the term "Indian tribe" as used in this subchapter shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

Statement of Interest and Summary of Argument

The United States appreciates the Court's invitation to address the important issues presented by this case, which involves the scope of tribal immunity to which the Copper River Native Association (CRNA), an intertribal consortium controlled and managed by federally recognized Indian tribes in Alaska, is entitled. CRNA administers numerous tribal services pursuant to the Indian Self-Determination and Education Assistance Act (Self-Determination Act, or Act), 25 U.S.C. §§ 5301 *et seq.*. The plaintiff is a former CRNA employee who alleges that she was improperly fired from her job and is suing CRNA for breach of her employment contract.

Each of the federally recognized Indian tribes that control and manage CRNA would be entitled, as a matter of federal law, to tribal sovereign immunity in a suit by a former employee asserting such a claim. This case presents the question whether CRNA, an intertribal consortium, is also entitled to tribal sovereign immunity in similar circumstances. The answer is yes, for two reasons.

First, Title V of the Act states that when tribes "join together for the purpose of participating in self-governance" by using intertribal consortia such as CRNA to deliver services, 25 U.S.C. § 5381(a)(5), an authorized intertribal consortium "shall have the *rights and responsibilities* of the authorizing Indian tribe" when providing Title V services, *id.* § 5381(b) (emphasis added). Tribal sovereign immunity—*i.e.*, the right of a sovereign not to be sued without its consent—is a foundational right of the tribes that run CRNA. The "rights and responsibilities" recognized by Section 5381(b) therefore include CRNA's right to tribal sovereign immunity to bar the former employee's suit. Recognizing an intertribal

consortium's right to immunity in this context is not an undue expansion of the doctrine of tribal sovereign immunity.

Second, CRNA is also immune under background principles of sovereign immunity because CRNA functions as an arm of the federally recognized Indian tribes that govern it. Courts have not adopted a uniform approach to determine whether an entity is an arm of a tribe or tribes. But the overarching concern of the various tests employed in this context is whether the purposes of tribal sovereign immunity—including self-governance—would be served by treating a particular entity as part of the tribe itself and therefore as immune from suit to the same extent as the tribe. For that inquiry, relevant factors include whether the tribe(s) intended to share immunity with the entity; whether the entity's purpose is to promote tribal self-governance; the extent of tribal control over the entity; the financial relationship between the tribe(s) and the entity; and the method of the entity's creation. Those factors weigh in favor of immunity in this case: the tribes passed resolutions authorizing CRNA to receive federal healthcare funds and provide healthcare services to tribal members; CRNA does so pursuant to the Self-Determination Act, a federal statutory scheme that promotes tribal self-governance; the tribal members control and manage CRNA; and record evidence shows that any damage award in this case would financially harm CRNA's member tribes and impede CRNA's ability to provide tribal healthcare services.

This Court's arm-of-the-tribe analysis in *Runyon ex rel. B.R. v. Association of Village Council Presidents*, 84 P.3d 437 (Alaska 2004), is somewhat inconsistent with the multifactor approach employed by a majority of federal and state courts. In *Runyon*, the Court stated

that an entity "takes on tribal sovereign immunity only if the tribe or tribes . . . are the real parties in interest." *Id.* at 440. To determine whether a tribe is a real party in interest, the Court viewed the entity's financial relationship with the tribe as the issue of "paramount importance." *Id.* If a tribe "would be legally responsible for the entity's obligations," the Court stated that the entity "may be an arm of the tribe" depending on other factors. *Id.* at 441. To the extent that *Runyon* may be read to preclude an entity from being an arm of the tribe unless the tribe is liable for a judgment against the entity, the United States respectfully submits that *Runyon* should be overruled or limited because it places too little weight on other factors relevant to promoting the purposes of tribal immunity.

Statement of the Issues

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301 *et seq.*, permits Indian tribes, including Alaska Native Villages, to enter into agreements with the federal government to administer certain federally funded programs, services, functions, and activities. Title V of the Act provides that tribes may work together through intertribal consortia to do so. An intertribal consortium authorized to carry out those programs, services, functions, or activities "shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in [Title V])." *Id.* § 5381(b).

CRNA is an intertribal consortium formed, controlled, and managed by federally recognized Indian tribes in Alaska. It administers a variety of services, including a "Senior Citizens' Program," pursuant to Title V of the Act. The plaintiff in this case is a former CRNA employee who alleges that she was fired from her job as Director of that program

and is suing CRNA for breach of her employment contract. The questions presented are as follows:

1. Whether the "rights and responsibilities" that CRNA enjoys under Section 5381(b) include immunity from plaintiff's breach-of-contract claim.

2. Whether, in the alternative, CRNA is immune from plaintiff's breach-of-contract suit under background principles of sovereign immunity, as an arm of the tribes that control and manage the consortium.

Statement of the Case

A. Statutory and Regulatory Background

Enacted in 1975, the Self-Determination Act resulted from Congress's conclusion that "the prolonged Federal domination of Indian service programs" has "denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities." 25 U.S.C. § 5301(a)(1). The Self-Determination Act "answered the call for a 'new national policy' of 'autonomy' and 'control' for Native Americans and Alaska Natives." *Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434, 2439 (2021) (quoting H.R. Doc. No. 91-363, at 3 (1970)).

This case concerns Title V of the Self-Determination Act, which addresses tribal self-governance "compacts" with the Indian Health Service, an agency within the U.S. Department of Health and Human Services. Title V authorizes an Indian tribe—which includes "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established

pursuant to the Alaska Native Claims Settlement Act"—to request that the federal government enter into a compact with a designated tribal organization to deliver federally funded healthcare services to tribal members if certain statutory requirements are met. 25 U.S.C. §§ 5304(e), 5385(b).

Congress amended the Self-Determination Act in 2000 to encourage and codify provisions for expanding the use of intertribal consortia to deliver those services. *See* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, sec. 4, § 501(b), 114 Stat. 711, 714. As amended, the Act defines "inter-tribal consortium" as "a coalition of two more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations." 25 U.S.C. § 5381(a)(5); *see also id.* § 5304(*l*) (defining "tribal organization" to include "any legally established organization of Indians which is controlled, sanctioned, or chartered" by "the recognized governing body of any Indian tribe").

The Act states that consortia have the same "rights and responsibilities" as the tribes themselves when operating pursuant to Title V and acting in the tribes' shoes:

> In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this subchapter, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this subchapter). In such event, the term "Indian tribe" as used in this subchapter shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

25 U.S.C. § 5381(b); *see* H.R. Rep. No. 106-477, at 19 (1999) ("The authorized Indian tribe, inter-tribal consortium or tribal organization may exercise the authorizing Indian tribe's rights as specified by tribal resolution."); S. Rep. No. 106-221, at 7 (1999) (similar).

B. Factual Background and Procedural History

1. The consortium at issue in this case is Ahtna' T' Aene Nene', also known as the Copper River Native Association (CRNA), a tribal health organization headquartered in Copper Center, Alaska. [Exc. 153]. The United States will refer to this consortium as "CRNA," consistent with the case's caption. Incorporated in 1972, CRNA was formed by federally recognized Indian Tribes in the Ahtna Region of Interior Alaska. During the time period relevant to this case, five tribes controlled and managed CRNA: the Native Village of Kluti-Kaah, the Native Village of Tazlina, the Gulkana Village Council, the Native Village of Gakona, and the Native Village of Cantwell. [Exc. 39, 155]; *see* [Exc. 156] ("CRNA is controlled and managed by our five federally-recognized member Tribes. Each Tribal Council elects or appoints a representative to CRNA's Board of Directors. This allows every Tribe to have an equal voice on matters related to how health services are made available to their communities."). CRNA describes itself as the "historic successor" of the Ahtna "Chief's Conference," a "traditional consultive and governing assembly of the Athabascan people of the Copper River Region." [Exc. 37]. Relevant here, CRNA is an "inter-tribal consortium" under the Self-Determination Act, acting on behalf of the federally recognized tribes that control and manage it. 25 U.S.C. § 5381(a)(5); *see* [Exc. 62, 80, 155-56].

CRNA "provides a wide variety of medical, dental, optometry, physical therapy, behavioral health, alcohol and substance abuse services, and health promotion and educational programs, including senior services." [Exc. 155]. Many of those services are federally funded through the Self-Determination Act. Under Title V and the Alaska Tribal Health Compact—which is a self-governance compact under Title V between the Indian

Health Service; certain federally recognized Indian tribes or tribal organizations acting on their behalf (including CRNA); and the Alaska Native Tribal Health Consortium, a non-profit tribal health organization formed primarily to deliver medical services at the Alaska Native Medical Center, *see* [Exc. 60, 63]—CRNA enters into funding agreements with the Indian Health Service to deliver healthcare services in the Ahtna region. [Exc. 155-56]. Those agreements define the scope of programs, services, functions, and activities that CRNA performs on behalf of the federal government. *Id.*; *see, e.g.*, [Exc. 81-100] (reproducing CRNA's funding agreement for FY 2018-2020). Pursuant to the funding agreement at issue here, CRNA has established a "Senior Citizens' Program," which "provides nutrition services to Elders 55 years of age and over, shopping assistance, passenger assistance, transportation, outreach and advocacy, information, and referral services to Elders and persons with handicaps or disabilities in communities in CRNA's area." [Exc. 86].

2. Plaintiff Yvonne Ito was employed by CRNA as "the Senior Services Program Director" from January 2018 to May 2019, when CRNA terminated her employment. [Exc. 157-58, 187]. After her termination, plaintiff sued CRNA's chief executive officer in the Superior Court of Alaska, asserting various state-law tort claims. The chief executive officer removed the case to federal court on the theory that plaintiff's tort claims were governed by the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* *See* Notice of Removal of State Court Action to U.S. District Court Action 2-3, *Ito v. Rude*, No. 20-cv-95 (D. Alaska Apr. 22, 2020). After removal to federal court, plaintiff voluntarily dismissed her suit. Notice of Dismissal, *Ito v. Rude*, No. 20-cv-95 (Apr. 27, 2020).

Plaintiff then filed the present suit against CRNA itself in the Superior Court of Alaska. Here, she asserts only a claim for breach of the implied covenant of good faith and fair dealing in her employment contract. [Exc. 13]. CRNA moved to dismiss the complaint, arguing that it is immune from plaintiff's breach-of-contract claim under both Section 5381(b)'s rights-and-responsibilities provision and background principles of tribal sovereign immunity.

In 2020, the Superior Court of Alaska (Crosby, J.) granted CRNA's motion to dismiss on sovereign-immunity grounds. [Exc. 186-203]. The court first addressed CRNA's argument that it is immune as "an arm of the tribe." [Exc. 189]. The court stated that the U.S. Court of Appeals for the Ninth Circuit and this Court have adopted different tests for establishing "arm-of-the-tribe" status. [Exc. 190-92]. The Ninth Circuit looks to a "non-exhaustive list of five factors" to evaluate whether enterprises affiliated with a tribe should be treated as the tribe for sovereign-immunity purposes:

> (1) the method of creation of the economic entities;
> (2) their purpose;
> (3) their structure, ownership, and management, including the amount of control the tribe has over the entities;
> (4) the tribe's intent with respect to the sharing of its sovereign immunity; and
> (5) the financial relationship between the tribe and the entities

[Exc. 190] (quoting *White v. University of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014)). The court contrasted that approach with this Court's decision in *Runyon ex rel. B.R. v. Association of Village Council Presidents*, 84 P.3d 437 (Alaska 2004), which stated that the "entity's financial relationship with the tribe" is of "paramount importance," such that an entity generally will

not be treated as an arm of an Indian tribe unless the tribe is the "real party in interest" and would be financially responsible for satisfying any adverse judgment. *Id.* at 440.

The court observed that CRNA would be considered "an arm of its member tribes" under *White* and that plaintiff had essentially conceded as much, but it expressed uncertainty about whether it had the authority to follow *White* rather than *Runyon*. [Exc. 190-95]. Ultimately, the court found it unnecessary to decide that issue. In the court's view, CRNA also qualifies as an arm of the tribe under *Runyon*, because "tribal assets would . . . be obligated to satisfy" any judgment against CRNA. [Exc. 198]; *see* [Exc. 199] (stating that the tribes that control and manage CRNA are the "real parties in interest" under *Runyon* because their "funds that would otherwise be used to provide for healthcare for tribal members would be at risk in the event of an adverse judgment").

The court also held, in the alternative, that Section 5381(b) of the Self-Determination Act provides a statutory basis for dismissing plaintiff's suit based on CRNA's tribal sovereign immunity. *See* [Exc. 195-96]. That provision states that an intertribal consortium authorized to carry out programs, services, functions, or activities under a Title V compact "shall have the rights and responsibilities of the authorizing Indian tribe[s]." 25 U.S.C. § 5381(b). The court determined that one of the "rights" that CRNA has under Section 5381(b) is the "right to assert tribal sovereign immunity." [Exc. 196].

Plaintiff appealed the dismissal of her complaint to this Court, which invited the State of Alaska and the United States to participate as amici curiae.

Argument

I. The "Rights and Responsibilities" Accorded to CRNA Under Section 5381(b) Include Immunity from a Former Employee's Breach-of-Contract Suit

A. Tribal Sovereign Immunity Is a Right Encompassed By Section 5381(b)

1. The Superior Court correctly determined that Section 5381(b) of the Self-Determination Act provides a statutory basis for dismissal of plaintiff's breach-of-contract claim. Section 5381(b) provides that where an "inter-tribal consortium" carries out "programs, services, functions, or activities" on behalf of a tribe, the consortium "shall have the rights and responsibilities of the authorizing Indian tribe." 25 U.S.C. § 5381(b); *see id.* § 5304(e) (defining "Indian tribe" to include "any Alaska Native village or regional or village corporation"). One of the core "rights" of a federally recognized Indian tribe is the right of a sovereign not to be sued without its consent. That right is subject to control by Congress, and parties may "bargain for a waiver of immunity" when interacting with tribes or consortia. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788, 796 (2014); *see Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998) ("[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."). But in Section 5381(b) Congress confirmed that an intertribal consortium like CRNA has the same "rights" as the tribes that control and manage it, and plaintiff did not bargain for any immunity waiver. CRNA is therefore entitled to tribal sovereign immunity to bar this suit.

There is no dispute in this case that CRNA is an "inter-tribal consortium" as that term is defined in the Self-Determination Act. *See* 25 U.S.C. § 5381(a)(5); [Exc. 196 n.41]. It is also uncontested that CRNA has been authorized by the federally recognized tribes that control and manage CRNA to carry out programs, services, functions, or activities under

Title V on behalf of those tribes. [Exc. 57-100, 155]. Nor is there any question that plaintiff's allegations involve the manner in which CRNA carried out its Title V responsibilities. And plaintiff does not contest that, if one of the tribes rather than CRNA had managed the Senior Citizens' Program and terminated her employment, sovereign immunity would bar her suit.

Despite those undisputed facts and legal propositions, plaintiff urges that her suit should go forward because tribal sovereign immunity is not one of the "rights and responsibilities" contemplated in Section 5381(b). That argument fails because tribal sovereign immunity is a well-established "right." The U.S. Supreme Court has, for example, observed that "many decisions of this Court recogniz[e] the sovereign authority of Native American tribes and their right to the common-law immunity from suit traditionally enjoyed by sovereign powers." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018) (quotation marks omitted); *see Wilson v. Alaska Native Tribal Health Consortium*, 399 F. Supp. 3d 926, 935 (D. Alaska 2019) (recognizing that the Section 5381(b)'s reference to "rights and responsibilities" "includes sovereign immunity"); *cf. Alden v. Maine*, 527 U.S. 706, 715 (1999) ("The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries." (quoting *Nevada v. Hall*, 440 U.S. 410, 414 (1979))). That immunity is "[a]mong the core aspects of sovereignty that tribes possess" and is "a necessary corollary to Indian sovereignty and self-governance." *Bay Mills*, 572 U.S. at 788. If any of the tribes that control and manage CRNA had employed plaintiff as director of an elder services program operated pursuant to Title V of the Self-Determination

Act, the tribe would have been immune from her breach-of-contract suit. Pursuant to Section 5381(b), CRNA is likewise immune.

The purpose of the Self-Determination Act amendments confirms the plain meaning of Section 5381(b)'s text. Congress amended the Act to encourage and expand the use of consortia by permitting a tribe to authorize an intertribal consortium or a tribal organization to step into the shoes of the tribe in carrying out a Title V compact. *See* H.R. Rep. No. 106-477, at 19 ("This definition enables an Indian tribe to authorize another Indian tribe, inter-tribal consortium or tribal organization to participate in self-governance on its behalf. The authorized Indian tribe, inter-tribal consortium or tribal organization may exercise the authorizing Indian tribe's rights as specified by tribal resolution."); S. Rep. No. 106-221, at 7 (similar). Section 5381(b) furthers that purpose by putting an intertribal consortia on the same footing as the federally recognized Indian tribes that control and manage it—giving such a consortium the same "rights and responsibilities" as the tribes themselves would have if they chose to participate under Title V individually rather than collectively. *Cf. Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 376 (10th Cir. 1986) ("Congress certainly could not have intended to withdraw" an exemption provided to Indian tribes under Title VII of the Civil Rights Act of 1964 "anytime a group of Indian tribes coalesce for a common purpose related to economic development."). Plaintiff's contrary position would implausibly impute to Congress an intent to expose a consortium to *greater* liability than if the tribes had provided the same services individually, even though the Act itself expressly authorizes tribes to deliver services through consortia. Such a result would discourage tribes from using

intertribal consortia to carry out functions under a Title V compact—an outcome flatly at odds with the purpose of the Self-Determination Act.

Even if there were ambiguity, the Self-Determination Act requires that "each provision of this chapter and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe." 25 U.S.C. § 5321(g). That provision would be inverted if Section 5381(b) were interpreted to deter rather than facilitate the use of intertribal consortia, which are themselves "Indian tribe[s]" under Title V, *id.* § 5381(b), to provide essential tribal services.

2. Plaintiff claims that Section 5381(b) only gives CRNA the limited rights and responsibilities expressly enumerated elsewhere in Title V of the Self-Determination Act, including rights to benefit from funding agreements or to initiate construction projects. Ito Opening Br. 11. But the text of Section 5381(b) contains no such limitation. Section 5381(b) refers broadly to the "rights and responsibilities of the authorizing Indian tribe." It does not limit those rights and responsibilities to those conferred by Title V of the Act. By contrast, when Congress sought to incorporate other provisions of Title V in Section 5381(b)—and only those provisions—it expressly did so. *See* 25 U.S.C. § 5381(b) ("In any case in which an Indian tribe has authorized . . . an inter-tribal consortium . . . to plan for or carry out programs, services, functions, or activities . . . on its behalf *under this subchapter*," which is Title V, "the authorized . . . inter-tribal consortium . . . shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or *in this subchapter*." (emphases added)). "Atextual judicial

supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019). And that principle is even stronger where, as here, Congress also directed courts to "liberally construe[]" "each provision" of Title V so that "any ambiguity shall be resolved in favor of the Indian Tribe." 25 U.S.C. § 5321(g). This Court should reject plaintiff's invitation to rewrite the statute and add "under this subchapter" after "rights and responsibilities of the authorizing Indian tribe."

3. Plaintiff further errs in relying on a provision in Title I of the Self-Determination Act stating that "[n]othing in this chapter shall be construed as affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. § 5332(1); *see id.* § 5396(a) (incorporating that provision into Title V, "to the extent not in conflict" with Title V). Plaintiff suggests that interpreting the "rights" a consortium has under Section 5381(b) to include the right to sovereign immunity would be in tension with Section 5332(1), *see* Ito Opening Br. 12-13, but that is incorrect. A determination with respect to the immunity of a particular intertribal consortium does not "affect[], modify[], diminish[], or otherwise impair[]" the sovereign immunity of tribes in any way. 25 U.S.C. § 5332(1). The tribes' own immunity is the same without regard to whether the consortium is also entitled to sovereign immunity. *Cf.* H.R. Rep. No. 93-1600, at 18 (1974) (stating that the purpose of Section 5332(1) is to "protect[] the sovereign immunity of Indian tribes from suit"); S. Rep. No. 93-762, at 14 (1974) (purpose is to "preserve[] the tribes' existing immunity from suit").

Plaintiff also appears to argue that, because the term "Indian tribe" is defined for purposes of Title V to include "inter-tribal consortium," 25 U.S.C. § 5381(b), the rule of construction in Section 5332 should be understood to mean that nothing in the Self-Determination Act may be construed "as affecting, modifying, diminishing, or otherwise impairing the sovereign immunity" of a *consortium*, *id.* § 5332(1)—and, further, that reading Section 5381(b) to provide a statutory basis for a consortium's immunity would impermissibly "affect[]" or "modify[]" the consortium's own immunity by expanding it. But those terms must be read in light of the surrounding statutory language—in particular, the reference to "otherwise impairing" sovereign immunity. Under established principles of statutory construction, where a catch-all provision follows a list of other specific provisions, the items enumerated in the specific provisions "must be read in light of the final, comprehensive category." *Federal Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973); *see Paroline v. United States*, 572 U.S. 434, 447 (2014). That canon applies with particular force where Congress uses a term such as "otherwise" to link the catch-all provision to the preceding provisions. Words such as "other" or "otherwise" make clear that the ensuing language will "relat[e] to and defin[e] the immediately preceding" language. *United States v. Standard Brewery*, 251 U.S. 210, 218 (1920); *United States v. United Verde Copper Co.*, 196 U.S. 207, 213 (1905).

Applied here, Congress's use of "otherwise" confirms that the catch-all provision "impairing" connects to, and establishes limitations on the meaning of, the phrase "affecting, modifying, diminishing." "Impairing" provides the common characteristic that all the provisions must share: when "read in light of th[at] final, comprehensive category," *Seatrain*

Lines, Inc., 411 U.S. at 734, the phrase "affecting, modifying, diminishing" refers to *weakening* tribal immunity, not anything else. Accordingly, reading Section 5381(b) to mean that an intertribal consortium may invoke tribal sovereign immunity does not impermissibly "affect[]" or "modify[]" the sovereign immunity of any intertribal consortium because that reading does not weaken ("otherwise impair[]") immunity.

That interpretation is also confirmed by Section 5332(1)'s legislative history, which indicates that it was intended to "protect[]," H.R. Rep. No. 93-1600, at 18, and "preserve[]," S. Rep. No. 93-762, at 14, tribal sovereign immunity. Plaintiff's reading would be contrary to this purpose by effectively requiring tribes to choose between sovereign immunity or operating as a consortium.

In any event, the provisions of Section 5332(1) apply only "to the extent not in conflict with this subchapter," which is Title V. 25 U.S.C. § 5396(a). The Self-Determination Act thus makes clear that, if any conflict exists between the general rule of construction in Section 5332(1) and the more specific provisions of Title V, including Section 5381(b), the more specific provisions must be given precedence. At a minimum, any ambiguity in the statutory scheme should "be resolved in favor" of Indian tribes and intertribal consortia. *See id.* § 5321(g).

B. Interpreting Section 5381(b) According to Its Plain Text and Purpose Does Not Unduly Expand Tribal Sovereign Immunity

For the reasons set forth above, Section 5381(b) is best interpreted to provide CRNA with tribal immunity in this case because its member tribes would have the same immunity if they had been sued by a similarly situated plaintiff asserting a breach of contract. That is not to suggest, however, that CRNA could invoke Section 5381(b) to shield itself from *any* suit

based on *any* allegation. Rather, the immunity of an intertribal consortium under Section 5381(b) is limited to its performance of functions under Title V as authorized by its member tribes through tribal resolutions. *See* 25 U.S.C. § 5381(b). Only then will the intertribal consortium have the same "rights and responsibilities" as the authorizing tribe for purposes of the Self-Determination Act.

By contrast, if an intertribal consortium is not planning for or carrying out Title V programs, services, functions, or activities pursuant to tribal resolutions, it cannot invoke immunity under Section 5381(b). For example, if a tribe has a "right" of first refusal to purchase a parcel of land for economic development or a "responsibility" to make an interest payment on a commercial loan, but those activities are unrelated to Title V, an intertribal consortium would not be able to invoke the same "right" or the same "responsibility" by virtue of Section 5381(b). Section 5381(b) instead refers to "rights and responsibilities" that attach when an intertribal consortium is planning for or carrying out programs, services, functions, or activities on the tribe's behalf under Title V. And in this case, it is uncontested that the plaintiff is suing CRNA for employment actions it took in the course of carrying out a Title V compact. If the tribe itself could invoke sovereign immunity in those circumstances, then under Section 5381(b) an intertribal consortium may do so as well.

Other federal and state statutes likewise provide for or waive sovereign immunity as a defense only "to some claims and not others." *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020) (discussing the Federal Tort Claims Act), *cert. denied*, 141 S. Ct. 2669 (2021). For example, under the Foreign Sovereign Immunities Act, Congress has determined that an

instrumentality of a foreign state is immune from many claims but not from an action "based upon a commercial activity carried on in the United States." 28 U.S.C. §§ 1603(b), 1605(a)(2). And many States have "abrogated the common law doctrine of sovereign immunity and have replaced it with statutes granting immunity for some government actions but not others." *Pimentel v. City of Los Angeles*, 974 F.3d 917, 928 n.5 (9th Cir. 2020) (Bennett, J., concurring).

Contrary to plaintiff's argument (Reply Br. 14), interpreting the "rights and responsibilities" language in Section 5381(b) to include the right to sovereign immunity would not result in "a significant expansion" of that doctrine. Congress did not expand sovereign immunity when it enacted Section 5381(b). It instead promoted "Indian sovereignty and self-governance," *Bay Mills*, 572 U.S. at 788 (quotation marks omitted), by allowing Indian tribes to form consortia that would share their immunity when carrying out functions under Title V, with the ultimate goal of furthering the tribes' ability to deliver healthcare services. By allowing tribes to act through intertribal consortia, defined as "a coalition of two more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations," 25 U.S.C. § 5381(a)(5), Congress enhanced the tools available to tribes to provide essential healthcare services to their members. Here, federally recognized tribes joined together to use CRNA—an entity they control and manage, *see* [Exc. 36-37, 156]—to promote their own self-governance in precisely the manner contemplated by Congress.

II. CRNA Is Entitled to Tribal Sovereign Immunity Pursuant to Background Principles of Sovereign Immunity in This Breach-of-Contract Suit

Because Section 5381(b) provides a statutory basis for CRNA's tribal sovereign immunity, this Court need not address whether CRNA would be entitled to immunity under basic federal principles of sovereign immunity even in the absence of that statute. If the Court reaches that issue, however, it should hold that CRNA is also immune from this suit on that basis.

Although those principles are sometimes referred to as being a matter of federal common law, sovereign immunity is an inherent attribute of sovereignty. *See Bay Mills*, 572 U.S. at 788-89. That is true not only of tribes and their organs, but of the United States, a State, or a foreign sovereign under our constitutional scheme, unless expressly abrogated or waived. *See id.*; *Kiowa*, 523 U.S. at 754. Courts have adopted a variety of approaches to determine whether an entity is entitled to tribal sovereign immunity as an arm of a tribe. Applying the critical principles identified under these varied approaches, it is the view of the United States that CRNA is entitled to dismissal of plaintiff's suit. To the extent this Court's decision in *Runyon* suggests a contrary result, this Court should modify or overrule that decision.

A. The Arm-of-the-Tribes Tests

1. The *Runyon* Test

In *Runyon*, this Court addressed whether a nonprofit Alaska corporation consisting of 56 Alaska Native villages that provided social services was entitled to, as a consortium, the sovereign rights of its member tribes. The corporation contracted with the federal government to operate a Head Start program for village members but allegedly failed to train

program teachers properly. 84 P.3d at 439. Parents of minors harmed by the corporation's alleged misconduct sued for damages.

The Court noted that each of the corporation's members has common law tribal sovereign immunity. 84 P.3d at 439. It also stated that a "subdivision of tribal government or a corporation attached to a tribe" may be an "arm of the tribe" also entitled to the tribe's immunity. *Id.* (quotation marks omitted). And it recognized that "[t]ribal status similarly may extend to an institution that is the arm of multiple tribes, such as a joint agency formed by several tribal governments." *Id.* at 440. "Whether the entity is formed by one tribe or several," the Court opined, "it takes on tribal sovereign immunity only if the tribe or tribes, the sources of sovereign authority and privilege, are the real parties in interest." *Id.*

For purposes of the "real party in interest" inquiry, the Court stated that a "corporation, agency, or other organization is an arm of a tribe for sovereign immunity purposes if its connection to the tribe—or tribes—is so close that allowing suit against the entity will damage the tribal interests that immunity protects." 84 P.3d at 440. The Court concluded that the entity's financial relationship with the tribe was of "paramount importance." *Id.* If a tribe "would be legally responsible for the entity's obligations," the Court stated that the entity "may be an arm of the tribe" depending on other factors "relating to how much control the tribe exerts or whether the entity's work is commercial or governmental." *Id.* at 441. Because any judgment in that case would be paid out of the corporation's "coffers alone," the Court ruled on the facts of that case that the corporation was "not an arm of the villages," the villages were "not the real parties in interest to this lawsuit," and the corporation was not entitled to immunity. *Id.*

2. Tests Applied by Other Courts

Since this Court's decision in *Runyon*, many other state and federal courts that have considered whether a given entity should be afforded arm-of-the-tribe status for sovereign-immunity purposes have coalesced on a more flexible, multifactor approach. For example, the Ninth and Tenth Circuits employ a broader inquiry tied to "whether the purposes of tribal sovereign immunity are served by granting [an entity] immunity." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1191 (10th Cir. 2010)). Relevant factors include:

- whether the tribe(s) intended to share immunity with the entity
- whether the entity's purpose is to promote tribal self-governance
- tribal control over the entity
- the financial relationship between the tribe(s) and the entity
- the entity's method of creation

See id. at 1187; *White v. University of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019); *People ex rel. Owen v. Miami Nation Enters.*, 386 P.3d 357, 365 (Cal. 2016); *Great Plains Lending, LLC v. Dep't of Banking*, 259 A.3d 1128, 1140-43 (Conn. 2021). The key distinction between this Court's *Runyon* decision and this multifactor approach is that a tribe's potential liability for satisfying a money judgment against the entity is but one of several factors, not a "threshold requirement for immunity." *Miami Nation*, 386 P.3d at 366 (describing *Runyon*).

3. The Proper Test

The approach employed by the Ninth and Tenth Circuits "properly account[s] for the understanding that tribal immunity is both an inherent part of the concept of sovereignty

and necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy." *Miami Nation*, 386 P.3d at 371 (quotation marks omitted). The factors "illuminate the degree to which imposition of liability on the entity would," as a practical matter, "impair tribal self-governance." *Id.* For example, if a tribe creates an entity to serve tribal purposes and exercises significant control over that entity, those factors would counsel in favor of the entity sharing in the tribe's immunity. And if the entity operates pursuant to a federal statutory scheme designed to promote tribal sovereignty and self-governance, that especially weighs in favor of immunity. But if a tribe did not intend to share its sovereignty with the entity, the entity's purpose is unrelated to promoting the tribe's sovereignty, or the tribe has no control over an entity's activities, those factors would counsel against the entity sharing in the tribe's immunity.

To the extent that *Runyon* is understood to focus exclusively on a tribe's financial insulation from a hypothetical judgment, that reading would not place enough weight on factors that promote federal tribal policies, including self-governance, that undergird tribal immunity. Most importantly, although "the financial relationship between a tribe and its economic entities is a relevant measure of the closeness of their relationship," it should not be "a dispositive inquiry." *Breakthrough*, 629 F.3d at 1187; *see Miami Nation*, 386 P.3d at 373. The other factors discussed above also "incorporate the understanding that tribal immunity should extend to arms of the tribe when such immunity would, as a practical matter, further" the federal policy "of tribal self-governance, which includes economic self-sufficiency, cultural autonomy, and the tribe's ability to govern itself according to its own laws." *Miami Nation*, 386 P.3d at 371 (quotation marks omitted). Taken together, those factors "illuminate

whether the dignity that immunity doctrine accords to the tribe by virtue of its sovereign status should extend to the entity by virtue of its status as a tribal affiliate." *Id.*

Focusing exclusively on whether a tribe is liable for a money judgment against the entity also overlooks other aspects of the financial relationship between a tribe and an entity. For example, a tribe and its members may indirectly bear the costs imposed by litigation against an affiliated tribal entity even when the tribe is not directly financially responsible for a judgment against the entity. *See* Tanana Amicus Br. 17-20. If the entity diverts resources that would otherwise be used to provide services to tribal members, the services may be decreased or eliminated, and a tribe may need to spend additional resources to augment or replace any services the entity could no longer provide.

Runyon's narrow focus on the real party in interest is also inconsistent with the approach to immunity taken in similar contexts. For example, the Foreign Sovereign Immunities Act defines a foreign state to include its instrumentalities, which are in turn defined in part as "organ[s] of a foreign state." 28 U.S.C. § 1603(b)(2); *see Kiowa*, 523 U.S. at 759 (finding Congress's approach to foreign sovereign immunity "instructive" for tribal immunity). Courts have looked to several factors to determine whether an entity is an organ, including the foreign sovereign's intent when it created the entity, the entity's purpose, and the amount of control the foreign sovereign exerts over the entity. *E.g.*, *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004); *cf. Lewis v. Clarke*, 137 S. Ct. 1285, 1293 (2017) ("[i]t is well established in our precedent that a suit against an arm or instrumentality of the State is treated as one against the State itself," but "[w]e have not before treated a lawsuit against an individual employee as one against a state instrumentality"). Courts examine similar factors

when addressing whether, for purposes of sovereign immunity, an entity is an arm of the States that created it. *E.g.*, *Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218, 224-28 (D.C. Cir. 1986) (entity operating an interstate mass transit system). For that inquiry, "the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued," *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 (1997), but it is not the only relevant factor.

Runyon also states that, if a tribe "would be legally responsible for the entity's obligations," one further factor the court should consider is "whether the entity's work is commercial or governmental." 84 P.3d at 441. The U.S. Supreme Court, however, has "declined" to "make any exception" to tribal immunity "for suits arising from a tribe's commercial activities." *Bay Mills*, 572 U.S. at 790; *see Breakthrough*, 629 F.3d at 1183 ("Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity.").

For these reasons, this Court should reconsider *Runyon*. To the extent that decision makes the question whether a tribe will be liable for any part of the judgment dispositive to the immunity inquiry, it is incorrect and "more good than harm would result from a departure from" the decision. *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1176 (Alaska 1993). By overlooking other important factors, *Runyon* threatens to "impair[] and undercut[] tribal self-governance"—particularly for small or remote tribes—by "forc[ing] a Tribe to choose between its state-court sovereign immunity and exercising its self-

determination" through the use of statutorily authorized intertribal consortia. Arctic Village Amicus Br. 17; *see id.* at 5 ("For some small and remote Tribes . . . economies of scale make it extremely difficult to assume all governmental services to which their citizens are entitled. These Tribes often choose to join together to form self-governing consortia across communities."). To minimize these adverse consequences, this Court should modify *Runyon* and adopt a more flexible, multifactor arm-of-the-tribe test that better promotes tribal sovereignty.

B. CRNA Is an Arm of the Tribes That Control and Manage It and Shares Their Immunity

CRNA is an arm of the tribal members that control and manage it. The tribes' intention is clear: "The Tribal Councils of each Tribe have passed Tribal government resolutions authorizing CRNA to receive the Tribe's federal health care funds and provide health care services to their Tribal members." [Exc. 155]. The entity's purpose is to provide essential tribal services pursuant to a federal statutory scheme intended to promote tribal sovereignty and self-governance. Even if this Court concludes that Section 5381(b)'s rights-and-responsibilities provision does not expressly provide for CRNA to share in the tribes' immunity, the Self-Determination Act's recognition and promotion of intertribal consortia to carry out the programs, services, functions, and activities offered pursuant to the Act on behalf of the tribes weighs heavily in favor of immunity.

The tribal members, which have "join[ed] together for the purpose of participating in self-governance" through CRNA, 25 U.S.C. § 5381(a)(5), also "control[] and manage[]" CRNA by each having a representative on CRNA's Board of Directors, [Exc. 156]. And although CRNA's budget "is substantially based on federal funds provided to benefit its

member Tribes and their Tribal members" rather than funds provided by the Alaska Native Villages, any damage award in this case "would have a direct and severe financial impact on [CRNA's] ability to provide health care services." [Exc. 156-57].

Finally, the method-of-creation factor does not weigh strongly in favor or against immunity. For this factor, courts have stated that, in general, "[f]ormation under tribal law weighs in favor of immunity," while "formation under state law has been held to weigh against immunity or to constitute a waiver of immunity." *Miami Nation*, 386 P.3d at 372 (citation omitted). But the place of incorporation is not the only relevant consideration. *E.g.*, *White*, 765 F.3d at 1025 (examining whether the entity "was created by resolution of each of the Tribes, with its power derived directly from the Tribes' sovereign authority"). Although CRNA is incorporated under state law, [Exc. 37], it is recognized under federal law and operates pursuant to Title V to perform functions otherwise undertaken by sovereign tribes. *E.g.*, Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 325(a)-(b), 111 Stat. 1543, 1597-98 (identifying CRNA as one of the regional health entities that Congress authorized to form and govern the Alaska Native Tribal Health Consortium); 43 U.S.C. § 1606(a); *see also* [Exc. 154] (CRNA created as "the historic successor" to "the Chief's Conference whose name is lost in antiquity, the traditional consultative and governing assembly of the Athabascan people of the Copper River Region from time immemorial"). Moreover, CRNA delivers healthcare services pursuant to, and expressly contemplated by, the Self-Determination Act, in accordance with tribal resolutions. [Exc. 111, 155]. The manner of incorporation is decidedly secondary to those central federal and tribal purposes.

Collectively, these factors show that CRNA is an arm of its member tribes under a proper application of the test employed by most courts. Indeed, plaintiff does not appear to contest this point; her primary argument is that *Runyon* controls and the arm-of-the-tribe tests developed by other courts are irrelevant. *See* Ito Opening Br. 6. While plaintiff correctly notes (Reply Br. 9-10) that this Court is not bound by the decisions of federal courts of appeals, this Court should adopt the approach employed by those courts for the reasons outlined above, especially given the statutory framework of the Self-Determination Act.

C. Even Under *Runyon*, Plaintiff's Suit Is Barred

Alternatively, even if this Court were to decline to adopt the predominant multifactor approach used in other federal and state courts, the Court should nevertheless find that *Runyon* supports CRNA's tribal sovereign immunity. Although this Court stated in *Runyon* that an entity will not normally be considered an arm of a tribe if the tribe is not the real party in interest that is "legally responsible for the entity's obligations," 84 P.3d at 441, the Court also observed that its inquiry was guided by the overarching question whether "allowing suit against the entity will damage the tribal interests that immunity protects," *id.* at 440. A proper consideration of the interests that immunity would serve in this case indicates that CRNA is immune from plaintiff's breach-of-contract suit.

The trial court determined that, "even though [CRNA's] member tribes are not parties to this lawsuit, they are 'real parties in interest' as that term is defined in *Runyon* because [the] member tribes' funds that would otherwise be used to provide for healthcare for tribal members would be at risk in the event of an adverse judgment in this matter."

[Exc. 199]. The record not only supports that conclusion, but also demonstrates that tribal healthcare is already threatened by this suit. [Exc. 157] ("This lawsuit has already required CRNA to expend resources that it would otherwise use to support such services. A continued obligation for CRNA to defend itself in this matter will adversely impact CRNA's mission of providing the highest quality health care services possible to the Tribal communities of the Ahtna Region."). The "tribal interests that immunity protects," *Runyon*, 84 P.3d at 440, including self-governance, would be infringed by allowing this suit to proceed because a judgment would impede CRNA's "ability to provide health care services," [Exc. 156-57]. A decision denying immunity would also, more broadly, deter tribes from using intertribal consortia in the first place. Thus, if this Court retains the approach adopted in *Runyon*, it should clarify that an entity may be an arm of the tribe even if the tribe is not directly liable for satisfying a money judgment against the entity. That is particularly true where, as here, a narrow reading of *Runyon* that foreclosed sovereign immunity would be contrary to the Self-Determination Act's express policy of providing for intertribal consortia to deliver vital services that promote tribal self-governance. *Cf. Bay Mills*, 572 U.S. at 789 (tribal immunity "is not subject to diminution by the States" (quoting *Kiowa*, 523 U.S. at 756)).

CONCLUSION

The judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND TYPEFACE

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I further certify, pursuant to Appellate Rule 513.5(c), that this brief is set in 13-point Garamond.

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